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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 273

HARRY BRIGGS, JR., ET AL.,

Appellants,

vs.

R. W. ELLIOTT, CHAIRMAN, ET AL.,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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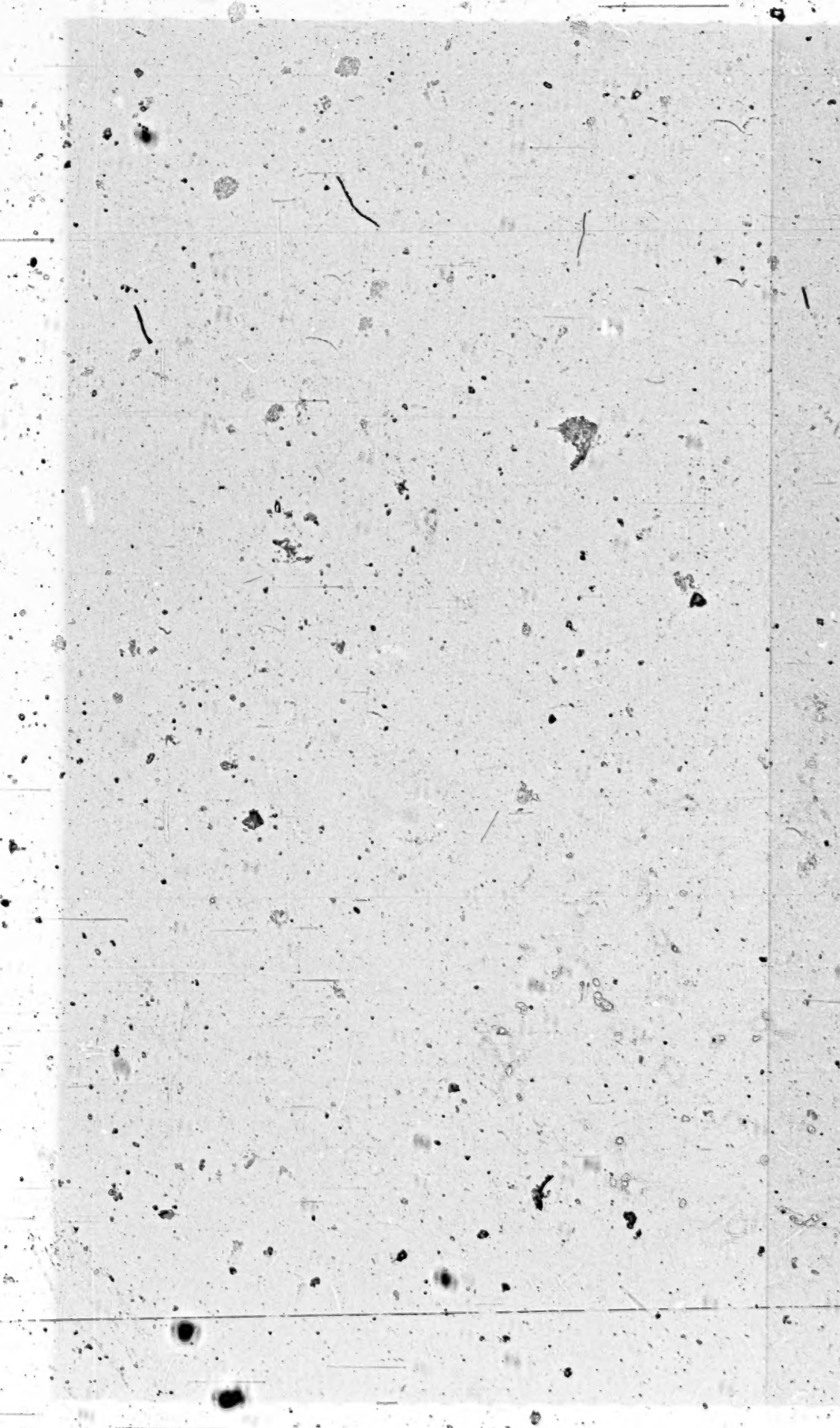

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APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS AND MOTION TO AFFIRM

Appellees seek to avoid review of the decision of the Court below by asserting: (1) that the question of the validity of statutes requiring segregation of the races in elementary and high schools can not be questioned in the light of the decisions of this Court in *Plessy* v. *Ferguson*, 163 U. S. 537; *Cumming* v. *Board of Education*, 175 U. S. 528; and *Gong Lum* v. *Rice*, 275 U. S. 78; and (2) that more recent decisions of this Court including the cases of *Sweatt* v. *Painter*, 339 U. S. 629; and *McLaurin* v. *State Board of Regents*, 339 U. S. 637 are not applicable because the *Sweatt* case involved a law school and the *McLaurin* case was limited to graduate education.

Neither *Plessy* v. *Ferguson, supra*, *Cumming* v. *Board of Education, supra*, nor *Gong Lum* v. *Rice, supra*, preclude a review of the decision in this case. *Plessy* v. *Ferguson* was presented to this Court on a record which itself assumed equality. The validity of racial segregation was not in issue in *Cumming* v. *Board of Education* which was decided on the question of the impropriety of the remedy sought. In *Gong Lum* v. *Rice*, the gravamen of the action was the objection of a Chinese child to being classified as a colored person for school purposes.

The record in the instant case presents for the first time competent, uncontradicted expert testimony sufficient to enable this Court to make a critical analysis of the constitutionality of statutes requiring racial segregation in elementary and high schools. No such evidence appeared in the records of any of the cases considered controlling by the appellees.

The testimony in the record in this case clearly distinguishes it from the above cited cases. If, however, the separate but equal doctrine of these cases is considered applicable then it should be reexamined in the light of facts now revealed for the first time in the present record.

> "In reaching this conclusion we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself. Here we are applying,

contrary to the recent decision in *Grovey v. Townsend*, the well established principle of the Fifteenth Amendment forbidding the abridgement by a state of a citizen's right to vote. *Grovey v. Townsend* is overruled." *Smith* v. *Allwright*, 321 U. S. 649, 665-6.

The issue in the case of *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637, was "whether a state may, after admitting a student to graduate instruction in its state university, afford him different treatment from other students solely because of his race." (at p. 638). The unanimous opinion of this Court decided: "Appellant, having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races." (at p. 642).

The issue in the instant case is whether a state which undertakes to provide public education on the elementary and high school levels for its residents can satisfy the requirements of the equal protection clause of the Fourteenth Amendment if it compels the segregation of Negro pupils from all other pupils. The uncontradicted testimony of appellants' expert witnesses show that compulsory racial segregation of pupils was harmful to the segregated students on the elementary and high school levels and deprived them of educational opportunities and advantages equal to those enjoyed by white students.

This Court found racial separation harmful and a deprivation of the equal protection of the laws in the *McLaurin* and *Sweatt* cases based upon expert testimony of the nature presented at the trial of this case. In the majority opinion the court below distinguished these two cases on the grounds that they were meant to be applicable to only graduate and professional education, whereas the dissenting judge felt that rationale of the *McLaurin* and *Sweatt* cases should be applied in the disposition of this case.

In another recent case[1] expert testimony similar to that introduced in the instant case showed the effect of racial segregation upon public school pupils in Topeka, Kansas. The three-judge court of the United States District Court for the District of Kansas included in its Findings of Fact a finding that: "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial integrated school system."

In its opinion the Court said: "It is vigorously argued and not without some basis therefor that the later decisions of the Supreme Court in *McLaurin* v. *Oklahoma*, 339 U. S. 637, and *Sweatt* v. *Painter*, 339 U. S. 629 . . . show a trend away from the *Plessy* and *Lum* cases."

". . . If segregation within a school as in the *McLaurin* case is a denial of due process, it is difficult to see why segregation in separate schools would not result in the same denial. Or if the denial of the right to commingle with the majority group in higher institutions of learning as in the *Sweatt* case and gain the educational advantages resulting therefrom, is lack of due process, it is difficult to see why such denial would not result in the same lack of due process if practiced in the lower grades."

The court, however, was of the view that the *Sweatt* and *McLaurin* cases were limited to graduate and professional

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[1] *Brown* v. *Board of Education of Topeka*, Civil Action No. T-316, Decided August 3, 1951.

education. "We are accordingly of the view," the court concluded, "that the *Plessy* and *Lum* cases . . . have not been overruled and that they still presently are authority for the maintenance of a segregated school system in the lower grades."

"The prayer for relief will be denied and judgment will be entered for defendants with costs."

Thus both in this case and in the *Topeka* case, *supra*, lower courts have concluded that the principles enunciated in the *McLaurin* and *Sweatt* cases are applicable to questions of equal educational opportunities at the graduate and professional school level only. Yet, that this is not the view of this Court is apparent from its disposition of *Rice* v. *Arnold*, — U. S. —, decided Oct. 10, 1950.

If a question involving segregation in the use of a municipal golf course must be remanded to the court below for reconsideration in the light of the *Sweatt* and *McLaurin* cases, as in *Rice* v. *Arnold*, it seems evident that the rationale of these two decisions necessarily governs a determination as to whether equal educational opportunities have been furnished at the elementary and high school level. Certainly the instant cause should be reviewed to remove any ambiguity with respect to this question.

Appellees' Motion to Dismiss Should Be Denied

The appellees take the position that this was an action for a declaratory judgment to declare the Negro schools of Clarendon County, South Carolina, unequal to the white schools of that county and to enjoin the enforcement of the statutes of South Carolina requiring racial segregation in public schools—that there were two causes of action, one which was finally determined and one which has not been finally decided.

Appellants contend that there is but one cause of action, that is, the effort to enjoin the enforcement of the statutes

of South Carolina requiring the segregation of the races in public schools. This issue was clearly raised in the pleadings, was supported by competent testimony and was decided by the District Court.

The appellees, having amended their answer to admit the inequalities in physical facilities of the schools and having consented to an injunction against these inequalities, the only question in the case at the beginning of the trial was the question of the constitutionality of the statutes. This question was decided by the majority of the Court in its decree which held that the enforcement of these statutes did not violate the provisions of the Fourteenth Amendment and that appellants were "not entitled to an injunction forbidding segregation in the public schools of School District No. 22." The second paragraph of the decree ordered the appellees to "proceed at once to furnish to [Appellants] and other Negro pupils of said district educational facilities, equipment, curricula and opportunities equal to those furnished white pupils."

Appellees contend that this order is not final or reviewable by this Court because of the last statement in the decree: "And it is further ordered that the defendants make report to this Court within six months of this date as to the action taken by them to carry out this order. And this cause is retained for further orders."

The one issue requiring a three-judge Court has been finally determined. The District Court refused to issue an injunction restraining the enforcement of the statutes in question. The other portion of the decree requiring equalization of physical facilities was likewise final. The court could not have intended, as appellees contend, that the appellees be given six months to equalize facilities, for to do so would be contrary to the decisions of this Court. *Sipuel v. Board of Regents*, 332 U. S. 631. In the absence

of a review by this Court all that remains is the question of enforcemen of the decree. All that is required is that the appellees report to the Court within six months of the "action taken by them to carry out *this order.*" (Italics ours.)

The latent powers of a court to reopen or revise its judgment does not prevent a judgment from being final. *Market Street Railway Co.* v. *Railroad Commission,* 324 U. S. 548, 551. In *Knox National Federal Loan Association* v. *Phillips,* 300 U. S. 194, in an action to retire shares of stock of a federal farm loan association where the lower court granted the relief, appointed a receiver and reserved the right to control the conduct of the officers and to rescind or modify its order, this Court stated at page 137:

> "The primary purpose of the suit was the recovery of a judgment for the par value of the shares. Any other relief prayed for or awarded was tributary to that recovery; it was a form of equitable execution to make collection possible. When the amount invested in the stock was adjudged to constitute a debt, whatever followed in the decree was auxiliary and modal."

In *Winthrop Iron Co.* v. *Meeker,* 109 U. S. 180, 183 a judgment containing a provision—"And the Court reserves to itself such further directions as may be necessary to carry this decree into effect, concerning costs, or as may be equitable and just"—was nevertheless a final judgment. This Court stated:

> "The whole purpose of the suit has been accomplished . . . the litigation of the case is terminated, and nothing now remains to be done, but to carry what has been decreed into execution. Such a decree has always been held to be final for the purpose of an appeal."

See also: *Carondelet Canal and Nav. Co.* v. *Louisiana*, 233 U. S. 362; *St. Louis Iron Mt. and Southern Railway Co.* v. *Southern Express Co.*, 108 U. S. 24.

In the instant case the District Court ordered appellees to furnish to the Negro pupils of the district "educational facilities, equipment, curricula, and opportunities equal to those furnished white pupils." Under this decree the only thing remaining to be done is to furnish the facilities ordered. No further judicial question exists. The litigation of the parties as to the merits of the case is terminated. All that remains for the Court to do is to police its order. Such a decree is similar to the decrees where an equity court decides the issues in a case and orders an accounting. This Court has repeatedly held that such decrees are final. *Forgay* v. *Conrad*, 6 How. 201, 202; *Radio Station WOW* v. *Johnson*, 326 U. S. 120.

Thus, where the judgment disposes of the whole case on its merits and the court below has nothing to do but execute its decree its order is final. *Bostwick* v. *Brinkerhoff*, 106 U. S. 3.

In making that determination this Court "will examine both the judgment and the opinion as well as other circumstances which may be pertinent." *Gospel Army* v. *City of Los Angeles*, 331 U. S. 543, 548.

It should further be pointed out that there is no question but that the Court finally and definitely refused to grant the injunctive relief appellants were seeking—to enjoin enforcement of the Constitution and statutes of South Carolina, requiring segregation of the races, on the grounds of unconstitutionality. Such an order is clearly reviewable where the appeal is made pursuant to Title 28, Sections 1253 and 2101. *Eichholz* v. *Public Service Commission*, 306 U. S. 268.

Appellants, it is submitted, must seek a review of the lower court's decision at this time in order to avoid any obstacle to this Court's final determination as to whether the statute and constitutional provisions of South Carolina which require segregation of the races in public schools conform to the requirements of the equal protection clause of the Fourteenth Amendment.

Appellees' Motion to Affirm Should Be Denied.

Appellants' rights to the equal protection of the laws are present and personal. *Sipuel* v. *Board of Regents, supra; Sweatt* v. *Painter, supra; McLaurin* v. *Board of Regents, supra.* At the time of the judgment in this case appellants were entitled to a decree enforcing these rights. The only way this could have been done would have been to order that appellants be admitted into the schools set aside solely and exclusively for white pupils in School District No. 22 and in the Summerton High School District without segregation or discrimination. *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Sweatt* v. *Painter, supra; Wilson* v. *Board of Supervisors,* 94 L. Ed. (Ad. Op.) 200; *McKissick* v. *Carmichael,* 187 F. 2d 949.

To affirm the judgment in this case would be to establish a precedent that the rationale of the *Sweatt* and *McLaurin* decisions could not be applied to a case involving elementary and high school education. An affirmance of the judgment in this case would also mean that appellants' rights to the equal protection of the laws could be postponed to a future date.

Conclusion

The majority opinion of the District Court subordinated the individual rights of appellants to the state's segregation policy. The rationale of the *Sweatt* and *McLaurin* cases,

supra, was disregarded. Although the Supreme Court has clarified the issue as to graduate and professional schools, the Court has never had the opportunity to consider the question as to elementary and high schools on the basis of a full and complete record with the issue clearly drawn and with competent expert testimony as appears in the record in this case. A clear-cut decision on this issue will remove all doubts in the field of public education.

For the foregoing reasons, appellees' motion to dismiss and motion to affirm should be denied.

Respectfully submitted,

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